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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 1157

ROBERT A. HELTON, Administrator of the Estate of WALTER J. PROBERT, Deceased,

Petitioner,

vs.

CHARLES M. THOMSON, Trustee of Chicago & North Western Railway Company (Substituted for Charles P. Megan, Trustee, and Chicago & North Western Railway Company),

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS.

REPLY BRIEF OF PETITIONER.

CHARLES C. SPENCER,
HARRY A. BARNHARDT and
RICHARD M. SPENCER,
Counsel for Petitioner.

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If the Court Please:

We avail ourselves of the privilege granted by Rule 38, 4, (a), of filing a short reply brief.

A New Decision By This Court.

The decision of this Court in *Jacob* v. *City of New York*, 62 S. Ct. 854, was filed March 30, 1942, and was published on April 15, after our brief in the instant case was written.

In the *Jacob* case, for the third time within less than three months (*Seago* v. *N. Y. C. RR. Co.*, 62 S. Ct. 806; *Southern Railway Company* v. *Stewart*, 62 S. Ct. 616; *Jacob* v. *City of N. Y.*, 62 S. Ct. 854) this Court granted certiorari on behalf of the respective plaintiffs and reversed the judgments of the intermediate courts of review, in favor of the respective defendants, upon the ground that the intermediate court of review wrongfully held that the plaintiff had not made out a submissible case in a suit based upon the provisions of the Federal Employers Liability Act. In the *Jacob* case, the action was brought upon the Jones Act, which embodies the provisions of the Federal Employers Liability Act, and the case is, therefore, in fact, based upon the provisions of the latter Act.

In deciding that the case should have been submitted to the jury, and in reversing the judgment of the lower court, this Court through Mr. Justice Murphy says (62 S. Ct. 854):

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts. The present case is a suit by petitioner under the

Jones Act for personal injuries sustained when he fell because the wrench he was using to tighten a nut slipped under the torque applied to it. We are called upon to determine whether on the evidence adduced by petitioner, and in contravention of accepted juridical standards, petitioner was wrongfully deprived of his statutory right to jury trial by the action of the trial court in dismissing his complaint, thereby refusing to submit the case to a jury which had been duly empanelled to try it."

This Court then considers the evidence in the case and holds that it was sufficient to entitle the petitioner to have had the case submitted to the jury, and reverses the judgment of the Circuit Court of Appeals, for the Second Circuit, for holding the contrary (62 S. Ct. 855-857).

The petitioner in the instant case, who was plaintiff in the trial court, is in a decidedly more advantageous position to entitle him to relief by this Court, than he would have been, had the trial court simply directed a verdict against him and in favor of respondent.

In the instant case the trial court three times considered the question of whether or not the evidence introduced by petitioner entitled him to have his case submitted to the jury. First, at the close of plaintiff's evidence, the court considered the motion of respondent to direct the jury to return a verdict in his favor, but the court determining that there was substantial evidence in the record to sustain a verdict in favor of petitioner, denied this motion of respondent (Rec. 62). Second, counsel for respondent again, at the close of all the evidence, made a motion to direct a verdict for him, but after consideration by the court, this motion was again denied (Rec. 155).

Third, after the verdict of the jury in favor of petitioner, respondent moved the court for a new trial, but the trial judge, holding that the verdict of the jury was not against the manifest weight of the evidence, overruled the motion for a new trial and entered judgment on the verdict. Fourth, and perhaps most important of all, the jury, after careful consideration of all the evidence, rendered a verdict in favor of petitioner for $13,500 (Rec. 165).

A jury of local citizens, whose verdict is approved by a trial judge, who, as well as the jury, has the advantage of seeing the witnesses and hearing them testify, is the fact finding body, under the Constitution and law of the United States (7th Amendment of the Federal Constitution; *Southern Railway Co.* v. *Stewart*, 62 S. Ct. 616, 618) as well as under the Constitution and law of the State of Illinois, (Constitution of Ill. 1870, Art. II, Sec. 5; *Mirich* v. *Forschner Contracting Co.*, 312 Ill. 343) and not a court of three judges, who sitting behind closed doors, merely examine a printed record prepared by the losing party in the trial court.

If there is any substantial evidence in this record sustaining the verdict of the jury, (and who can say there is no such evidence after a careful examination of this record?) then the Appellate Court of Illinois, substituting its judgment for that of the jury and trial judge, has effectually nullified the right of trial by jury of the widow and minor child of Probert, and the Supreme Court of Illinois has perpetuated this wrong, by denying petitioner's leave to appeal (Rec. 171), and their only remedy is in the supervisory right of this Court of the judgments of the state courts.

Counsel for respondent devote pages of their brief (pp. 1 to 14) to what they are pleased to term "**Inaccuracies** and **Omissions.**"

We believe it would be an imposition on the Justices of this Court to attempt here to answer *seriatim*, these alleged claims. On a few of the high points in the case we do wish, here, to make some brief comments.

It is a gross perversion of the facts in the instant case to say that the train dispatcher, ordered Probert to set out the bad order car on the passing track. The message sent directed Probert to put the "part of the train you now have on east passing track," while the engine went to Waukegan, 5 miles away, and got the back part of the train that had been left there, and bring it to Lake Bluff. Probert was *not given any order* in regard to this 34th car in the train which was without working brakes, and would have endangered the whole train, as well as other traffic on the road, had the disabled car been left in the train. Probert discovered the car without brakes *after* the message had been delivered to him, and *after* he had left the engine and was on the ground 1300 feet away from the engine, and was without any means of communicating, either with the train dispatcher or the engineer. It then became his job and his duty, to set out the bad order car from the rest of the train. He had no directions by rule of the railroad, or by order of a superior exactly *where* to put the disabled car, and he immediately, and with efficiency, proceeded to set it out in the proper and logical place, that is on the north end of the housetrack where there was plenty of room for it, and where it would not have been in the way of any other traffic. It was only because of the negligence of the servants of respondent, who were in charge of the engine, in failing to obey Probert's signals that the fatal accident occurred.

In respondent's brief the following appears: "Several witnesses testified that, in the circumstances of this case 'it would be *improper* to set out the bad order car on the housetrack.' (Rec. 63, 64-74, 82-4, 85-7, 92-3, 99-100, 100-01, 102, 103-4, 107, 110-12, 128, 129, 130)." At the expense of some time we have re-read every word on the above designated pages of the record, but we fail to find the words, *contained in quotation marks* in counsel's brief, but which are not *quoted* from anything in the record.

As we have pointed out in our brief in the instant case, several witnesses, one of them being respondent's principal expert witness, testified that under the circumstances shown by the evidence the housetrack was the proper place on which to set out the bad order car, and no witness testified that it was not proper to put the bad order car on the housetrack (Petitioner's brief 11-13). Several of respondent's witnesses testified that it would have been proper railroading to have put the train of 34 cars on the passing track, (a thing which is probably not true unless the bad order car was first removed from the end of the 34 cars) but no witness for either side testified that it was *improper* to have set out the bad order car on the housetrack.

Gustav H. Shavel, the train dispatcher, who caused the message in question to be sent, in answer to questions put to him by the trial judge, said: "There was not any designation contained in my message as to a bad order car and where to set it out; *my message dealt with the string of thirty-four cars*" (Rec. 112-113).

Counsel say (Respondent's brief 2) that the engineer "ordered" Probert to do certain things, and cite Rec. 137, as a basis for this statement. Neither at record 137,

nor at any other place, does it appear that the engineer gave, or had the right or authority to give, any orders to Probert, the head brakeman. In the absence of the conductor and rear brakeman, as was the case here, the head brakeman was in charge of the train (Rec. 32, 33, 73).

Every employe of respondent who testified on the subject used the name "passing track", as designating the passing track in the instant case. They called it nothing else (Rec. 79, 91, 98, 110, 116, 123, 127, 138, 150). The claim that it was not used as a passing track is a mere subterfuge.

Counsel seeks to give the impression that the house track, and particularly the north end of the track had been very little used. We discussed this question in our Petition (pp. 14-15), but in addition to what we said there, we would like to point out the following evidence showing that the north end of the housetrack had been used and that it was a proper place for Probert to set out the bad order car.

Muto, section foreman for respondent, testified: "Before this accident, during the time I was there, *say ten years before, cars rolled up against those bumper ties, that is all, but not off*" (Rec. 120. Emphasis ours).

In its opinion, (Rec. 147), the Appellate Court states: "And it was he (Probert) who was responsible for the movement at Waukegan, leaving part of the train behind."

Following this entirely unfounded part of the opinion of the Appellate Court, counsel for the respondent, in their brief in this Court (Resp. Brief 4) states the following:

"Its obvious purpose is to mislead to the belief that Probert had the right to 'set out' the 'bad order' car, just as the conductor was doing at Waukegan, when he was interrupted by Probert's false report to the engineer and fireman that he had received a signal to pull out of town, which was the cause of the leaving of part of the train, and the conductor and rear brakeman, at that place."

This "false report" is wholly a creature of counsel's imagination. While there is evidence that Probert told the engineer and fireman at Lake Bluff that he, Probert, had got a highball from the rear end (Rec. 136), and although there were several witnesses of respondent who testified who ought to have known the facts of the case, there is not one who said anything indicating that all that Probert said about the signal coming from the rear end was not true.

Grogan, the conductor, who must have known whether he or his brakeman had given a signal which Probert received to start the train south did not attempt to explain the matter. Grogan simply testified "for some reason the front end of our train, that is the engine and the 34 cars, including this bad order car as the last car of the 34, left Waukegan and went on South on the eastward main line" (Rec. 127).

Foley, the rear brakeman who was left at Waukegan, says that he did not take any part in the operations at Waukegan and he did not testify concerning any signals that were given or not given (Rec. 132).

Kolls, another freight brakeman, employed by the respondent, testified about the proceedings at Waukegan but said nothing about the giving or failure to give any signals (Rec. 133-135).

No one of Probert's fellow workers came into court and testified that the dead man, who could no longer speak for himself, had given a "false report to engineer and fireman that he had received a signal to pull out of town." That remained to be done by counsel for respondent in this Court.

Counsel for the petitioner have attempted to state the facts, and inferences from the facts, correctly, although concededly in their most favorable light to the plaintiff, as we are entitled to do, in view of the verdict and judgment in favor of petitioner. Counsel for the respondent, in seven numbered paragraphs and fifteen lettered paragraphs, have set out alleged inaccuracies in their brief (Respondent's brief 1-14).

We have above pointed out what we believe to be the most glaring inaccuracies of counsel's corrections. Without inpugning the integrity of either counsel, all of this dispute as to the inferences to be drawn from the evidence merely tends to demonstrate, to this Court, that the matters involved were questions of fact for the jury and that the inferences drawn by the jury and its conclusion should be allowed to stand.

Counsel for respondent in their brief (p. 19) print the names of an imposing list of cases decided by this Court. A large number of these cases, so far as the claim is concerned that they are against the petitioner in the instant case, are disposed of by the opinion of Mr. Justice Roberts in *Rocco* v. *Lehigh Valley R. Co.*, 288 U. S. 275, 278, quoted by us in our first brief at page 24.

As to the other cases cited by counsel for respondent may we add a few words?

Great Northern Ry. Co. v. *Wiles,* U. S. 444, in which plaintiff's intestate failed to perform his positive duty of going back to flag an oncoming train. There was no other negligence by any person connected with the railroad company.

Atlantic Coast Line v. *Davis,* 279 U. S. 34, in which a man chose to stand on a certain very small place where it was known to him to be very dangerous instead of standing in any one of several other places which were just as convenient where there would be no danger. There was no negligence shown on the part of the railroad company.

Southern Ry. Co. v. *Gray,* 241 U. S. 333, where a brakeman sent forward to flag an oncoming train, lay down with his head on a tie close to the rail and was killed by the train that he was sent to flag.

Frese v. *C. B. & Q. R. R.,* 263 U. S. 1, where an engineer violated a state statute requiring him to come to a complete stop and ascertain positively whether the crossing was clear, but proceeded across and had a collision and was killed.

Respectfully submitted,

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Counsel for Petitioner.